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Attorneys for Defendant City of Scottsdale

BEFORE THE ARIZONA CORPORATION COMMISSION

Commissioners:

Kristen K. Mayes, Chairman

Paul Newman

Gary Pierce

Sandra D. Kennedy

Bob Stump

Docket No. T-20567A-07-0662

**HEARING MEMORANDUM FROM
INTERVENOR CITY OF SCOTTSDALE,
ARIZONA**

IN THE MATTER OF THE APPLICATION
OF NEWPATH NETWORKS, LLC, FOR
APPROVAL OF A CERTIFICATE OF
CONVENIENCE AND NECESSITY TO
PROVIDE TRANSPORT AND
BACKHAUL TELECOMMUNICATIONS
SERVICES

Hearing Date: 4/27/09

Arizona Corporation Commission

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Comes now, the City of Scottsdale, Arizona, who has been granted permission to intervene in these proceedings, and submits the following hearing memorandum for consideration by the administrative law judge and the Commission why NewPath Networks application for a Certificate of Convenience and Necessity should be denied or, alternatively, substantially limited in scope. The City contends that regulation by this Commission of a provider of distributed antenna systems ("DAS") to major wireless telephone carriers is preempted by the Federal Telecommunications Act. Additionally, even if not preempted, the business activities of these DAS providers are not clothed with a public interest so as to justify status as a public service company within the jurisdiction of this Commission. The legal and factual basis supporting the City's position is more fully set forth in the Memorandum of Points and Authorities below.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. THE ARIZONA CORPORATION COMMISSION DOES NOT HAVE JURISDICTION**
3 **BECAUSE NEWPATH PROVIDES DISTRIBUTED ANTENNA SERVICES WHICH**
4 **ARE MOBILE SERVICES AND REGULATION BY THE COMMISSION IS**
5 **PREEMPTED BY FEDERAL LAW.**

6 The Federal Telecommunications Act ("FTA") provides:

7 3) State preemption

8 (A) Notwithstanding sections 152(b) and 221(b) of this title, **no State or local**
9 **government shall have any authority to regulate the entry of or the rates charged**
10 **by any commercial mobile service or any private mobile service, except that this**
11 **paragraph shall not prohibit a State from regulating the other terms and**
12 **conditions of commercial mobile services.**

13 47 U.S.C.A. § 332(c). Although the FTA does allow a state to petition the Federal Communications
14 Commission ("FCC") for permission to regulate mobile services, Arizona has not received such
15 permission. In fact, Arizona has petitioned the FCC for permission to regulate the entry and rates of
16 mobile services and has been denied such permission. *See In the Matter of Petition of Arizona*
17 *Corporation Commission, To Extend State Authority Over Rate and Entry Regulation of All*
18 *Commercial Mobile Radio Services and In the Matter of Implementation of Sections 3(n) and 332 of*
19 *the Communications Act*, 1995 WL 316476, 8 (F.C.C.)) Thus, this Commission should be especially
20 cautious that it does not overstep the federal preemption of the FTA when it has already been denied
21 permission to do so.

22 New Path is Offering "Mobile Service." As noted above, the Commission's authority does not
23 extend to regulation of "mobile services."¹ Mobile service is defined by Congress in 47 U.S.C.A. §
24 153 (27):

25 The term "mobile service" means a radio communication service carried on between

26 ¹ Although the preemption of 47 U.S.C. § 332(c) discusses commercial mobile service and private mobile service, the FCC has determined that all mobile services fall into either one category or the other. *Implementation of Sections 3(N) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 F.C.C.R. 1411 (1994) (CMRS Order").

1 mobile stations or receivers and land stations, and by mobile stations communicating
2 among themselves, and includes (A) both one-way and two-way radio communication
3 services, (B) a mobile service which provides a regularly interacting group of base,
4 mobile, portable, and associated control and relay stations (whether licensed on an
individual, cooperative, or multiple basis) for private one-way or two-way land mobile
radio communications by eligible users over designated areas of operation . . .

5 (Emphasis added.)² In its application to this Commission, NewPath describes its proposed services as:

6 NewPath's DAS [Distributed Antenna System] offering involves a communication
7 signal handed off from NewPath's customer to NewPath that NewPath then transports
8 over its fiber optic facilities. This hand off and transport takes place at and through
9 locations called "nodes" that are often located on replacement light standards located in
10 public rights-of-way or utility easements. The typical installation "node" in NewPath's
11 network consists of equipment that permits communications that were received in
12 **Radio Frequency (i.e., "RF" or wireless)** format to be converted to optical signals and
transported over fiber optic lines. The equipment comprising a typical node in
NewPath's network includes a small, **low-power antenna**, and equipment for the
conversion of **RF signals** to optical signals (or from optical to RF), fiber optic lines, and
also associated equipments, such as power supplies.

13 *(NEWPATH APPLICATION AND PETITION FOR CERTIFICATE OF CONVENIENCE AND*
14 *NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATIONS SERVICES, ATTACHMENT*

15 E)(emphasis added). The application also notes that it is made for providing "Radio Frequency
16 Transport and Backhaul Services." And in its proposed tariff, NewPath defines its Distributed Antenna
17 System ("DAS") as including "Remote Nodes," i.e., "land stations," which, among other things, convert
optical signals to radio signals for transmission. (NewPath Application, Attachment B, Sheet 7.)

18 While the ultimate receiver of this radiofrequency transmission from the Remote Node is unidentified,
19 it is safe to assume that the transmission is sent to a mobile telephone, a.k.a. "mobile station" or
20 "receiver."³

21 Although NewPath provided the definition of "mobile service" to the Commission in its
22 *Objections to Applications for Intervention by the City of Scottsdale, Arizona, and the Towns of*
23 *Paradise Valley and Carefree, Arizona* (hereinafter "NewPath Objections"), NewPath failed to analyze

25 ² 2. 47 U.S.C.A. § 153 (33) defines radio communication as "the transmission by radio of writing, signs, signals, pictures,
26 and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding,
and delivery of communications) incidental to such transmission.

³ It is also noteworthy that the nodes used by NewPath for transmitting and receiving the radio communications are
one of only two services for which a rate is prescribed in the proposed tariff. (NewPath Proposed Tariff, Sheet 33.)

1 why its services were not mobile services within the meaning of 47 U.S.C. §§ 153(27) and -332.
2 Instead, it chose to engage the Commission in an exercise of technical distinctions between Private
3 Mobile Radio Services ("PMRS") and Commercial Mobile Radio Services ("CMRS"). (NewPath
4 Objections, pp. 16-18.) This is a distinction without a difference for this discussion because § 332
5 preempts state regulation of both PMRS and CMRS. And the FCC has concluded that all mobile
6 services are within the ambit of § 332. See *In the Matter of Implementation of Sections 3(N) and 332*
7 *of the Communications Act, Regulatory Treatment of Mobile Services*, 9 F.C.C.R. 1411 (March 7,
8 1994)(hereinafter "the CMRS Order"), p.10, ¶ 34.⁴

9 NewPath's lack of a frequency license does not change the result.⁵ NewPath is functionally
10 acting as an arm for the CMRS providers with whom it enters long term leases for distributed antenna
11 nodes. In connection with proposed rulemaking which requires each cell site to have backup power, an
12 FCC Committee has also determined that there is no reason to distinguish DAS from traditional
13 wireless carriers:

14 NextG explains that it provides telecommunications services to wireless carriers via a
15 network architecture that uses fiber-optic cable and small antennas mounted in the
16 public rights-of-way on infrastructure such as utility poles, street lights and traffic signal
17 poles. **NextG argues that DAS Nodes should not be treated as a cell site** because the
18 DAS Node does not include some of the features typically associated with a cell site.
19 The antenna is not associated with a base station or network switching equipment at the
20 DAS Node site. [citation omitted] NextG and MetroPCS maintain that even if the
21 Commission does treat the DAS Node as a cell site this equipment should be exempt
22 from the backup power rule because it is "technologically, financially, and politically
23 infeasible" to install eight hours of backup power . . .

24 **We decline to exempt DAS Nodes** or other sites from the emergency backup power
25 rule. Rather, we believe that to the extent these systems are necessary to provide
26 communications services, **they should be treated similarly to other types of assets**

22 ⁴ NewPath's reference to categories of service which the FCC classified as PMRS is irrelevant. Those services were
23 examples of those included as PMRS, not an exclusive list. NewPath's suggestion that the question of mobile services is
24 based on the spectrum also does not support its application. While it is true that the FCC has indicated that certain devices
25 operating within the unlicensed portion of the spectrum will not be classified as mobile services (CMRS Order, p. 10, ¶ 37),
26 NewPath does not operate within the unlicensed portion of the spectrum. Instead, it operates within licensed CMRS
frequency bands, presumably with permission from the CMRS license holder. See 2/18/09 Hearing Transcript, Testimony
of Stephen Garcia, 26:22-24 ("The Node is the point where we transmit the wireless carrier's frequency to serve that
particular area.")

⁵ However, the Commission must certainly question how NewPath can be a "common carrier" and a "public service
company" when the primary customers it serves are large commercial mobile radio service providers who hold multi-million
dollar FCC frequency licenses.

1 **that are subject to the rule.** We note that many of the arguments made by petitioners
2 are similar to the physical constraint arguments raised by other parties. As we stated
3 earlier, we see no reason why LECs and CMRS providers who choose to place assets at
4 locations with limited physical capacities should generally be excused from compliance
5 with the rule. We realize that many providers have begun to use DAS and other small
6 antenna systems as part of their communications networks. That fact alone, however, is
7 far outweighed by the need to ensure a reliable communications network.

8 *IN THE MATTER OF RECOMMENDATIONS OF THE INDEPENDENT PANEL REVIEWING THE*
9 *IMPACT OF HURRICANE KATRINA ON COMMUNICATIONS NETWORKS*, 2007 WL 2903938,
10 14, 22 F.C.C.R. 18013, 18030, 18030, 22 FCC Rcd. 18013 - 18031, 22 FCC Rcd. 18013 (emphasis
11 added).

12 The very nature of a Certificate of Convenience and Necessity ("CC&N") is this Commission's
13 regulation of the rates and the market entry of the company so seeking. However, regulation of the
14 rates and market entry of mobile services such as NewPath by this Commission is preempted by federal
15 law. Thus, the Commission should decline to exercise jurisdiction over NewPath.⁶

16 **II. NEWPATH IS NOT A PUBLIC SERVICE COMPANY BECAUSE IT IS NOT A**
17 **COMMON CARRIER AND THERE IS NO PUBLIC INTEREST IN REGULATING**
18 **ITS BUSINESS ACTIVITIES.**

19 The jurisdiction of this Commission is derived from the Arizona Constitution. Ariz. Const.,
20 Article XV, Section 2 provides:

21 All corporations other than municipal engaged in furnishing gas, oil, or electricity for
22 light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public
23 purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling
24 purposes; or engaged in collecting, transporting, treating, purifying and disposing of
25 sewage through a system, for profit; or in **transmitting messages or furnishing public**
26 **telegraph or telephone service**, and all corporations other than municipal, operating as
27 common carriers, shall be **deemed public service corporations.**

28 And Ariz. Const., Article XV Section 10 provides:

29 Railways heretofore constructed, or that may hereafter be constructed, in this State, are
30 hereby declared public highways and all railroads are declared to be common carriers

31 ⁶ The City recognizes that the Commission may have issued a CC&N to one or more competitors of NewPath who
32 also provide DAS services. While the City agrees that competitors should be treated fairly and equally by this Commission,
33 the proper remedy when a public body acts in excess of its jurisdiction is to rescind the acts which were taken in excess of
34 that jurisdiction, not perpetuate them further. Accordingly, A.R.S. § 40-252 vests this Commission with the power to
35 rescind, amend, or alter any previous order made by it.

1 and subject to control by law. **All electric, transmission, telegraph, telephone, or**
2 **pipeline corporations, for the transportation of electricity, messages, water, oil, or**
3 **other property for profit, are declared to be common carriers and subject to**
4 **control by law.**

5 On its face, these constitutional provisions appear to be all-encompassing. However, the Arizona
6 courts have determined that not all companies engaged in these activities are public service companies.
7 To be within the Commission's jurisdiction, a company must engage in business activities which are a
8 matter of public concern:

9 A corporation falling within the definition of "public service corporation" is subject to
10 the jurisdiction of the Arizona Corporation Commission. *General Alarm, Inc. v.*
11 *Underdown*, 76 Ariz. 235, 238, 262 P.2d 671, 672 (1953); A.R.S. § 40-202 (1985). . . .
12 Although *Trico Electric Cooperative v. Corporation Commission*, 86 Ariz. 27, 339 P.2d
13 1046 (1959), applied this definition literally, **our supreme court has held more**
14 **recently that meeting the literal textual definition is insufficient.** In *Arizona*
15 *Corporation Commission v. Nicholson*, the supreme court stated:
16 **"To be a public service corporation, its business and activity must be such as to**
17 **make its rates, charges, and methods of operations a matter of public concern. . . .**

18 *Southwest Gas Corp. v. Arizona Corp. Com'n*, 169 Ariz. 279, 285-287, 818 P.2d 714, 720 - 722 (App.
19 1991). In its Objections, NewPath mischaracterizes the analysis in which the Commission should
20 engage. The issue is not whether the public may have some general interest in the services which the
21 company provides, rather the question is whether or not the business and activity of the company are
22 such that its rates, charges, and methods of operation are a matter of public concern. *Arizona*
23 *Corporation Commission v. Nicholson*, 119 Ariz. 257, 259, 580 P.2d 718, 720 (1978). The record in
24 this matter demonstrates that neither the rates, charges, or methods of operation of NewPath are a
25 matter of public concern sufficient to warrant regulation by this Commission. To guide the analysis,
26 the courts have set forth eight important factors:

- 21 (1) What the corporation actually does.
- 22 (2) A dedication to public use.
- 23 (3) Articles of incorporation, authorization, and purposes.
- 24 (4) Dealing with the service of a commodity in which the public has been generally held to have
25 an interest.
- 26 (5) Monopolizing or intending to monopolize the territory with a public service commodity.
- (6) Acceptance of substantially all requests for service.
- (7) Service under contracts and reserving the right to discriminate is not always controlling.
- (8) Actual or potential competition with other corporations whose business is clothed with
public interest.

1 *See, e.g., Gas Service Co. v. Serv-Yu Cooperative*, 70 Ariz. 235, 237-38, 219 P.2d 324, 325-36 (1956).

2 To begin the analysis, it is useful for the Commission to look at a key factor -- that NewPath's
3 customers are not individual consumers but rather large, sophisticated customers which are not in need
4 of Commission protection. Commission staff has noted this important point:

5 Well, their tariff says it is from their customers. And that's what I think Staff
6 would focus on. Their customers are very large businesses, very large carriers. If you
7 look at from the standpoint of sort of the way marketing works and business works, I
8 would -- well, it would be possible to say that **the customers have more control than
9 the provider.**

10 (2/18/09 Hearing Transcript, Testimony of Armando Fimbres, 66:8-14)(emphasis added). The nature
11 of the customer's control is confirmed by NewPath as it advised this Commission that it seeks to
12 construct a system in Scottsdale because it won a competitive bid through an RFP process with AT&T.
13 (2/18/09 Hearing Transcript, Testimony of Stephen Garcia, 24:7-12; 35:20.) Our Supreme Court has
14 recognized that the purpose of regulation by the Commission is to protect public consumers from
15 excessive and discriminatory rates and inferior service:

16 "the purposes of regulation are to preserve and promote those services which are
17 indispensable to large segments of our population, and to prevent excessive and
18 discriminatory rates and inferior service where the nature of the facilities used in
19 providing the service and the disparity in the relative bargaining power of a utility
20 ratepayer are such as to prevent the ratepayer from demanding a high level of service at
21 a fair price without the assistance of governmental intervention in his behalf."

22 *Petrolane-Arizona Gas Service v. Arizona Corporation Commission*, 119 Ariz. 257, 259, 580 P.2d
23 718, 720 (1978)(quoting *In Re Geldbach Petroleum Co.*, 56 P.U.R.3d 207 (Mo. 1964)). In light of
24 that standard, this Commission must determine if regulation of NewPath's rates, charges or methods of
25 operation is in the public interest in a market where the customers have more power than the company.
26 Here, NewPath does not serve the general public, instead it has won a competitive bid from AT&T. In
a marketplace dominated by the Customer, it seemingly goes without saying that regulation is
unnecessary.

27 A. **NEUPATH AND THE OTHER DAS PROVIDERS APPLYING TO THIS**
28 **COMMISSION FOR CC&N'S REALLY SEEK ONLY ILLUSORY**
29 **REGULATION FROM THIS COMMISSION.**

Turning to the nature of the DAS business, NewPath and other DAS Providers seemingly have

1 this Commission engaged in a complex game of "cat and mouse." Essentially, they seek a CC&N from
2 this Commission which they seemingly believe provides them some competitive advantage in the
3 marketplace, but they balk at any real regulation by this Commission. In fact, NewPath flat out denies
4 the jurisdiction of this Commission:

5 "NewPath does not provide its services to consumers and it is nowhere stated in either
6 Commission Rules or the ARS that a DAS provider is required to obtain a CC& N prior
7 to providing services in Arizona. Based on the aforementioned, NewPath understood
8 that it did not need a CC&N to provide its services. NewPath is currently seeking a
CC&N in conjunction with a jurisdictional request tied to a negotiation of a franchise
agreement."

9 (NewPath Response to A.C.C. Staff's Letter of Insufficiency and First Set of Data Requests, STF
10 1.4(6)).⁷ In its defense, this is an entirely rational response to the staff inquiry because NewPath is
11 correct that there is nothing in the law or the Commission Rules which contemplates a DAS Provider
12 being issued a CC&N by this Commission. Nor is there any reference in the statutes or rules to a class
13 of service known as "transport and backhaul services."⁸

14 Ironically, this Commission's internet information site seemingly classifies DAS Providers
15 under the category of a Competitive Local Exchange Carrier ("CLEC").⁹ Facially, this may make sense
16 because CLEC is a recognized class of service and the DAS providers make numerous references to
17 being in competition with CLEC's authorized by this Commission. NewPath itself asserts that it
18 should be issued a CC&N because "[t]he Commission has issued CC&N's to over 60 Competitive
19 Local Exchange Carriers." (NewPath Objections, p. 22, lines 6-7.) And NewPath references other

20 ⁷ The City does not dispute this contention that NewPath can do business without a CC&N. Although the City does
21 require a CC&N for a telecommunications license in Scottsdale, that is not the exclusive way for a provider to access the
22 City's right of way . In fact, the City currently has over fifty wireless communication facilities in its right of way and none
of the respective owners have a telecommunications license with the City and are not believed to have a CC&N from this
Commission. Further, the City also enters agreements allowing for conduit and/or optical fiber in the right of way with
providers who do not have a telecommunications license.

23 ⁸ In its application to this Commission, NewPath declined to check any of the standard boxes for recognized services
by this Commission including the box for "Facilities-Based" Local Exchange Telecommunications Services." Instead,
24 NewPath simply checked the box for "Other" and made up its own category of service. (NewPath Application, p.1, Section
A.) To a certain extent, NewPath cannot be blamed for this because it was merely following the lead of its competitor, Next
25 G who had already filed with this Commission.

26 ⁹ Next G Networks, whom NewPath repeatedly references as a primary competitor, was issued a CC&N by this
Commission in August, 2006 to provide "private line and intrastate access services in order to supply transport and backhaul
telecommunications services to other carriers, including but not limited to wireless telecommunications service providers.
(Commission Docket NO. T-20377A-05-0484.) However, Next G is listed as a CLEC on the Commission's web site
(http://www.cc.state.az.us/Divisions/Utilities/Utility_List/clec_list.pdf).

1 states which have issued CLEC status to DAS providers.¹⁰ (NewPath Objections, pp. 15-16, note 3.)
2 However, this is nothing more than part of the "cat and mouse" game the DAS providers are playing
3 with this Commission.

4 CLEC status is recognized by this Commission's rules. *See* Ariz. Adm. Code, Title 14, Chapter
5 2, Articles 5 and 11. However, NewPath's application for a CC&N is facially invalid under those rules.
6 NewPath has not identified the actual number of customers within the service area or the estimated
7 number of customers to be served within the first five years of operation as required by R14-2-
8 502(A)(1)(g). Nor has it explained how it will provide local dial tone service like CLEC's do and how
9 it will comply with the interconnection requirements of R14-2-1111 and -1112. This is probably
10 because NewPath expressly disclaims being a CLEC despite comparing itself to that status. *See*
11 NewPath Application for CC&N, Section A-14 ("[Bond] [n]ot applicable because applicant does not
12 propose to provide long distance or local exchange services in Arizona.") If the DAS providers are
13 truly competing with actual CLEC's for business, the Commission's treatment of the DAS providers is
14 patently unfair for the CLEC providers. The CLEC's have to comply with actual regulations and
15 responsibilities imposed by the Commission, while the DAS providers are simply seeking the benefits
16 of a CC&N while not accepting the burdens of regulation associated therewith.¹¹

17 This fact is exemplified by the failure of the DAS providers to comply with the Commission's
18 rules regarding contribution to the Universal Service Fund. Ariz. Adm. Code, Title 14, Chapter 2,
19 Article 12. In particular, R14-2-1210(B) requires that:

20 [a]ny telecommunications provider, which begins providing telecommunications service
21 after the effective date of this Article shall, within 30 days of beginning to provide
22 intrastate service in Arizona, provide a letter to the Administrator acknowledging that
23 provider's obligation under this Article to make monthly payments for the local and/or

24 ¹⁰ NewPath's certificate from the California Public Utilities Commission also certifies it as a Competitive Local
25 Exchange Carrier. (Exhibit A.)

26 ¹¹ An examination of Next G's docket, T-20377A-05-0484, indicates that the Commission has no apparent interest in
regulating the DAS Providers anyway. Next G was issued a CC&N by order of this Commission on August 29, 2006 and
then filed its tariff in October, 2006. Since that time, there has been no activity in the docket, no annual reports, no
regulation, and the Commission has decided to close its file despite Next G's continuing to do business. (August 5, 2008
Compliance Memorandum.)

1 toll portion, as appropriate, of the AUSF contribution in accordance with this Article."¹²
2 Although NewPath has not yet received a CC&N, nowhere does it appear in the staff report that it
3 should be required to file such a statement if it does and an examination of the record in the Next G
4 proceedings indicates a complete lack of compliance with this requirement as well.¹³

5 **B. APPLYING THE YU-SERV FACTORS LEADS TO THE CONCLUSION THAT**
6 **THE REGULATION OF NEWPATH'S BUSINESS IS NOT CLOTHED WITH**
7 **PUBLIC INTEREST.**

8 Returning to the factors announced in *Yu-Serv*, it is clear that NewPath's business activities are
9 of a private interest, not a public one. While NewPath's articles of organization are a neutral
10 consideration, the other factors do not support issuing a CC&N. What NewPath actually does is
11 provide Distributed Antenna Systems for commercial mobile radio services. The nature of its business
12 is fully analyzed above. There is no evidence that these services are dedicated to public use; instead,
13 they are dedicated to use by an exclusive class of large commercial wireless telephone carriers who
14 possess multi-million dollar FCC frequency licenses.¹⁴ Nor is the dedication for public use factor
15 irrelevant as NewPath suggests. (NewPath Objections, p. 12, lines 18-19.) The very case that
16 NewPath relied on to support its argument, *Southwest Transmission Co-op., Inc. v. Arizona Corp.*
17 *Com'n*, noted that dedication to public use is a key consideration:

18 ¹² 47 U.S.C.A. § 254(f) provides that "[e]very telecommunications carrier that provides intrastate telecommunications
19 services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the
20 preservation and advancement of universal service in that State.

21 ¹³ Extenet, another DAS Provider, has engaged in similar regulatory dodging with this Commission. Docket No. T-
22 20597A-08-0320. In its Response to the Staff's First Set of Data Requests, Extenet informed the Commission that it does
23 not even intend to have a customer service center in the State. Later, when asked to explain why its rates were competitive
24 in comparison to competitors, Extenet asserted, "Within ExteNet's industry, services are highly customized in ICB contracts,
25 so there is no standard method for charging for individual services." It then noted, "Extenet negotiates ICB contracts for all
26 its telecommunications services." In its response to A.C.C. staff inquiries, Next G was also quick to point out that "[t]he
vast majority of [Next G]'s customers, therefore, negotiate individual case basis contracts. . ." Docket No. T-20377A-05-
0484. Next G also made sure to point out to the Commission that its "customers are sophisticated carriers and
communications companies experienced in negotiating charges and other contract terms . . ."

¹⁴ NewPath has expressed concern that it may not be able to sell excess fiber capacity which it may have from
installation of its DAS systems to large businesses or schools. There is no evidence that NewPath could not sell such
services without a CC&N and Arizona courts have made clear that Commission jurisdiction does not necessarily extend
beyond those functions of a public utility which are essential to its public service anyway. See, e.g., *Mountain States Tel.*
and Tel. Co. v. Arizona Corp. Commission, 132 Ariz. 109, 115, 644 P.2d 263, 269 (App. 1982)("It is clear both under
prior Arizona decisions and the decisions of other states that a public utility may provide services which are not imbued
with a public interest and thus may not be subject to Commission regulations.") In this regard, it is telling to note that the
proposed Tariff from NewPath makes no mention of the fees or terms of offering of these incidental services.

1 The purposes of regulation are to preserve those services indispensable to the population
2 and to ensure adequate service at fair rates where the disparity in bargaining power
3 between the service provider and the utility ratepayer is such that government
4 intervention on behalf of the ratepayer is necessary. *Sw. Gas*, 169 Ariz. at 286, 818 P.2d
5 at 721 (citing *Petrolane-Ariz. Gas Serv. v. Ariz. Corp. Comm'n*, 119 Ariz. 257, 259, 580
6 P.2d 718, 720 (1978)). Competition is the general rule. *Gen. Alarm*, 76 Ariz. at 238, 262
7 P.2d at 672. **However, when an entity dedicates private property to a use in which
8 the public has an interest, it grants the public an interest in that use and must
9 submit to regulation for the public good.** *Ariz. Corp. Comm'n v. Nicholson*, 108 Ariz.
10 317, 320, 497 P.2d 815, 818 (1972). The right to public protection then outweighs the
11 right of competition. *Gen. Alarm*, 76 Ariz. at 238, 262 P.2d at 672.

12 213 Ariz. 427, 432, 142 P.3d 1240, 1245 (App. 2006)(emphasis added). Thus, dedication of private
13 property to public use appears to be the essence of a "public service company." NewPath's assertion
14 that this is irrelevant can only be seen as an admission that it has not designated any of its private
15 property for public use. And if it does not designate its property for public use, it cannot be a public
16 service company.

17 While NewPath does generally deal with telecommunications, the commodity which it offers --
18 DAS -- is not one to be generally of a public interest. As made clear, its services are dedicated to large,
19 sophisticated wireless telephone carriers who are quite capable of insuring that they protect themselves
20 without assistance from the Commission. The City also disagrees with NewPath's assertion that the
21 issue of monopolization is irrelevant. The potential for monopoly is one of the fundamental tenants of
22 a public service corporation, thus necessitating regulation of rates and services to protect the public.
23 NewPath has amply demonstrated that there is no such need in this instance.

24 The next two factors, acceptance of substantially all requests for service and service under
25 individual contracts, essentially contemplate an analysis of whether or not the company is a "common
26 carrier." NewPath is not a common carrier. And while that is not always controlling, here it is
persuasive because of the lack of any other indication of a need for regulation.¹⁵

NewPath confirms this when it suggests that it is a "carrier's carrier." (NewPath Objections, p.
22, line 8.) Along with Next G and Extenet, NewPath has also noted that most, if not all, contracts are
done on an individual case basis (ICB). (2/18/09 Hearing Transcript, Testimony of Stephen Garcia,

¹⁵ The court in *American Cable Tel. v. Ariz. Public Service Co.*, 143 Ariz. 273, 693 P.2d 928 (App. 1983), noted that for a
message transmitting company to be a public service company it must be a common carrier.

1 38:19-39:24.) "Carriers' carriers" are not "common carriers." The case of *Virgin Islands Telephone*
2 *Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999), is instructive. In *Virgin Islands Telephone*, AT&T
3 contracted with a subsidiary, ATT-SSI, to install underwater fiber optic cable between the U.S.
4 mainland and Virgin Islands. The FCC classified ATT-SSI as a non-common carrier and a competing
5 carrier challenged the classification.¹⁶ In reviewing the FCC decision, the D.C. Circuit upheld the
6 classification as a non-common carrier noting that 1) ATT-SSI did not sell its capacity directly to the
7 public, and 2) ATT-SSI engaged in individual price negotiations with customers on price and terms
8 depending on needs, duration of contract, and technical specifications. Thus, the court held that a
9 company will not be a common carrier where its practice is to make individualized decisions in
10 particular cases whether and on what terms to serve. Here such individualized decisions are the
11 mainstays of NewPath's business model. The *Virgin Islands Telephone* court also declined to look to
12 the customer's customers to determine common carrier status. 198 F.3d at 926-30. Similarly, in
13 *Southwest Gas Corp. v. Arizona Corp. Com'n*, this Commission declined to treat a wholesaler of
14 natural gas as a public service corporation in part because of its limited base of approximately ten
15 customers. 169 Ariz. 279, 285-287, 818 P.2d 714, 720 - 722 (App.1991). NewPath is a carrier's
16 carrier serving only a few major industry players on an individual case basis. It is not a common
17 carrier.¹⁷

18 The final factor for consideration is whether or not there is potential competition with other
19 companies whose business is clothed with public interest. This also fails. Although NewPath suggests
20 that it may compete with CLEC's, it expressly does not offer local exchange service. And there is no
21 evidence in the record of this docket to suggest that CLEC's are offering distributed antenna systems to
22 the major wireless carriers in competition with NewPath, Next G, Extenet or other DAS providers.
23

24 ¹⁶ The classification as a non-common carrier allowed ATT-SSI to avoid various regulations and requirements
25 imposed by the FCC upon common carriers.

26 ¹⁷ NewPath's reliance upon *Southwest Transmission Co-op., Inc. v. Arizona Corp. Com'n* is misplaced. Although
the cooperative that was found to be a public utility did not sell directly to customers, it was a cooperative formed by
members who did. Further the cooperative was already subject to regulation under federal law. Thus, on those facts, which
do not exist in NewPath's case, a public utility was found. 213 Ariz. 427, 429, 142 P.3d 1240, 1242 (App. 2006).

1 **III. CONCLUSION.**

2 NewPath offers distributed antenna systems to customers who are primarily wireless telephone
3 carriers such as AT&T. These services involve the transmission and receipt of radiofrequency signals
4 and meet the definition of mobile services under federal law. Thus, this Commission is preempted by
5 47 U.S.C. § 332(c) from exercising jurisdiction -- at least to the extent of the wireless services provided
6 by NewPath. Even if jurisdiction is not preempted by federal law, this Commission should decline to
7 exercise jurisdiction because NewPath's business activities are not clothed with a public interest to
8 make them a public service company. To the contrary, NewPath's services are offered primarily on an
9 individual case basis to a small market of large commercial wireless providers in a marketplace where
10 the customers have more power than the providers.

11 **RESPECTFULLY SUBMITTED** this 24th day of April, 2009.

12 **SCOTTSDALE CITY ATTORNEY'S OFFICE**

13
14 By: _____

15 Deborah W. Robberson, City Attorney
16 Eric C. Anderson, Assistant City Attorney
17 3939 North Drinkwater Boulevard
18 Scottsdale, Arizona 85251
19 Attorneys for Defendant City of Scottsdale

20 **ORIGINAL and 13 copies** of the
21 foregoing filed this 24th day of
22 April, 2009 with:

23 Arizona Corporation Commission
24 Docket Control
25 1200 W. Washington Street
26 Phoenix, AZ 85007

1 **COPY** of the foregoing mailed this
2 24th day of April, 2009, to:

3 The Honorable Yvette B. Kinsey
4 Administrative Law Judge
5 Hearing Division
6 Arizona Corporation Commission
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8 Phoenix, AZ 85007

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26

By:  _____

EXHIBIT A

Decision 06-04-030 April 13, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of NewPath Networks, LLC
(U-6928-C) for a Modification to its Certificate of
Public Convenience and Necessity in Order to
Provide Competitive Local Exchange, Access and
Non-Dominant Interexchange Services.

Application 05-05-021
(Filed May 25, 2005)

**OPINION MODIFYING NEWPATH NETWORKS, LLC
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**

I. Summary

This decision modifies NewPath Networks, LLC's (Applicant or NewPath) Certificate of Public Convenience and Necessity (CPCN) so that it may provide full competitive local exchange, access and non-dominant interexchange services for the entire state of California.

II. Background

In prior decisions, we authorized the provision of competitive interexchange services by carriers meeting specified criteria. In addition, we authorized the provision of Competitive Local Exchange Carriers (CLEC), by carriers meeting specified criteria, within the service territories of Pacific Bell Telephone Company (Pacific), Verizon California Inc. (Verizon), SureWest Telephone Company (SureWest) formerly named Roseville Telephone Company, and Citizens Telecommunications Company of California, Inc. (CTC).

Applicant, a New Jersey limited liability company qualified to transact business in California, was granted a CPCN to provide "facilities-based" inter-Local Access and Transport Area (LATA) and intraLATA telecommunication

services in California as a Non-dominant Interexchange Carrier (NDIEC). That authority was granted pursuant to Decision (D.) 04-11-005. Its principal place of business is located at 1300 N. Northlake Way, Seattle, WA 98103. Applicant seeks to expand its CPCN so that it may provide full facilities-based competitive local exchange and access service, where such is authorized, and NDIEC service for the entire state of California.

III. Financial Qualifications

To be granted a CPCN for full facilities-based CLECs, an applicant must demonstrate that it has a minimum of \$100,000 of cash or cash equivalent to meet the firm's start-up expenses.¹ An applicant must also demonstrate that it has sufficient additional resources to cover all deposits required by local exchange carriers (LECs) in order to provide the proposed service.

Applicant submitted under seal its current financial information substantiating that it has a minimum of \$100,000 reasonably liquid and available for use. It does not currently owe and does not expect to owe deposits to the LECs. Applicant has demonstrated that it has sufficient cash available to satisfy the financial requirement.

IV. Technical Qualifications

Applicants seeking CLEC authority are required to make a reasonable showing of technical expertise in telecommunications or a related business. Applicant submitted biographical information on its officers and Board of Directors to demonstrate that it possesses sufficient experience and knowledge to operate as a telecommunications provider.

¹ The financial requirement for CLCs is contained in D.95-12-056, Appendix C. The financial requirement for NDIECs is contained in D.91-10-041.

V. Tariffs

Applicant submitted draft tariffs as a December 7, 2005 supplement to its application. Commission staff reviewed those draft tariffs for compliance with Commission rules and regulations. The deficiencies are noted in Attachment A to this decision. In its compliance tariff filing, Applicant is directed to correct these deficiencies as a condition of our granting approval of its tariffs.

VI. California Environmental Quality Act (CEQA)

The California Environmental Quality Act (CEQA, Public Resources Code Section 21000 et seq.) applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to "inform governmental decision-makers and the public about the potential significant environmental effects of the proposed activities." (Title 14 of the California Code of Regulations, hereafter CEQA Guidelines, Section 15002.)

Because the Commission must issue a discretionary decision (i.e., grant Section 1001 certificate authority) without which the proposed activity will not proceed, the Commission must act as either a Lead or Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA Guidelines Section 15051(b)). The Commission is the Lead Agency for this project under CEQA. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval.

NewPath seeks authority in this application to modify its existing limited facilities-based CPCN to include full facilities-based competitive local exchange, access and non-dominant interexchange service. NewPath initially filed this application on May 25, 2005, and filed supplements to its application on November 23, 2005 and December 7, 2005. In its November supplement, NewPath provides additional information to address its compliance with Rules

of Practice and Procedure 17.1 and the degree to which its planned outside construction implicates CEQA.

NewPath outlines its projected business activities and describes the types of facilities; its geographical location and extent; and provides adequate information to determine the degree of impact on the environment from such activities and the degree to which such activities and facilities may be exempt from further CEQA review. Applicant's facilities will carry the radio frequency traffic of Wireless Service Providers (WSPs) between its newly-deployed shared distributed antenna systems (DAS) and WSPs' existing facilities.

NewPath submits that its business activities associated with the installation of its DAS facilities are of such a limited nature that they should potentially qualify for a number of categorical exemptions available under CEQA. NewPath supports its case by providing a description of the types of facilities involved in a DAS network; and by Attachment E which provides both a proposed procedure by which NewPath would provide notice of the claimed exemption, and a detailed list of existing CEQA categorical exemptions that would apply to its installation of DAS facilities. The procedure proposed by NewPath would involve a submission of the following to the Commission CEQA staff: a detailed description of the proposed project; a description of the environmental setting; a construction workplan; a statement of the CEQA exemption(s) applicable to the proposed project; and documentation supporting the finding of an exemption.

Applicant's proposal would provide the Commission CEQA staff with a 21-day notice of a claim of exemption from CEQA; the staff would then have the opportunity to review the submittal and notify NewPath either of its approval or denial of its claim for exemption from CEQA review. An approval would result in the staff preparing a Notice to Proceed and a filing of a Notice of Exemption

with the State Clearinghouse, Office of Planning and Research; a denial would result in NewPath either re-designing the specific project and facilities, or filing a formal application with the Commission seeking the requisite approval and full CEQA review.

This application makes clear that Applicant's facilities-based DAS projects will consist of: predominantly aerial fiber optic facilities; the installation of compact "nodes" on existing utility poles; a minor amount of ground disturbance (100 - 200 feet) associated with connecting equipment enclosures on private property with the aerial right-of-way; aerial fiber runs of short distances, rarely exceeding 1,000 feet in length; all facilities to be located within public utility rights-of-way (with the exception of ingress and egress to and from); and projects and facilities that are widely separated geographically.

We have carefully reviewed this application and supplements and find that (1) applicant's proposed facilities-based project activities are indeed of a limited nature; (2) they would in almost all circumstances be highly likely to qualify for an exemption from CEQA; and (3) that the proposed process for reviewing the applicability of the exemptions for Applicant's DAS facilities-based projects is not only adequate for the Commission's purposes as CEQA Lead Agency, but is also in the public interest in that NewPath would be able to respond in a timely manner to WSPs requests for service without the delay or burden of a full CEQA review where it is not necessary.

A generic review of CEQA as it applies to jurisdictional telecommunications utilities is being undertaken in Rulemaking 00-02-003. To the extent a decision in that rulemaking proceeding modifies the CEQA process being adopted in this decision, applicant shall conform its CEQA process to that decision.

VII. Motion for Limited Protective Order

Applicant has filed a motion for a limited protective order and has requested authorization to file certain information regarding its financial position and anticipated number of customers in its first five years of operations under seal. We have granted similar motions in other proceedings, and we grant Applicant's motion here.

VIII. Conclusion

We conclude that the application conforms to our rules for authority to provide competitive local exchange telecommunications services. Accordingly, we shall approve the application subject to the terms and conditions set forth herein.

IX. Categorization and Need for Hearings

In Resolution ALJ 176-3154 dated June 16, 2005, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. There is no apparent reason why the application should not be granted. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

X. Comments on Draft Decision

This is an uncontested matter in which the decision grants the requested relief. Therefore, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

XI. Assignment of Proceeding

John A. Bohn is the Assigned Commissioner and Michael J. Galvin is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. A notice of the filing of the application appeared in the Daily Calendar on May 27, 2005.

2. There were no protests to this application.

3. A hearing is not required.

4. In prior decisions, the Commission authorized competition in providing interexchange services for carriers meeting specified criteria.

5. In prior decisions, the Commission authorized competition, by carriers meeting specified criteria, in providing local exchange telecommunications services within the service territories of Pacific, Verizon, SureWest, and CTC.

6. Applicant has a minimum of \$100,000 of cash or cash equivalent that is reasonably liquid and readily available to meet its start-up expenses.

7. Applicant has sufficient additional cash or cash equivalent to cover any deposits that may be required by other telecommunications carriers in order to provide the proposed service.

8. Applicant possesses sufficient experience and knowledge to provide telecommunications services.

9. As part of its application and supplemental application dated December 7, 2005, Applicant submitted a draft of its initial tariff that contained the deficiencies identified in Attachment A to this decision. Except for these deficiencies, Applicant's draft tariffs complied with the Commission's requirements.

10. Applicant's outside plant construction differs from that of traditional NDIECs and Competitive Local Carriers (CLCs) in that Applicant's projects consist largely of deploying aerial facilities that cover short distances, widely geographical, and not interconnected in a traditional network.

11. Applicant proposed a modified CEQA review process for its future construction projects.

12. The Commission is the Lead Agency for this project under CEQA.

13. NewPath seeks Section 1001 facilities-based certificate authority to install and operate DAS facilities.

14. NewPath filed a supplement to its application on November 23, 2005, wherein it provided detailed information on the degree to which its planned outside construction implicates CEQA.

15. NewPath submits that its business activities associated with the installation of its DAS facilities are of such a limited nature that they should potentially qualify for a number of categorical exemptions available under CEQA.

16. NewPath has proposed a procedure by which it would provide for both notice of the claimed exemption and for Commission staff review of said claim.

17. NewPath has provided a detailed list of existing CEQA categorical exemptions that would potentially apply to the installation of DAS facilities.

18. NewPath's proposed facilities-based project activities are indeed of a limited nature and would in almost all circumstances be highly likely to qualify for an exemption from CEQA.

19. NewPath's proposed process for reviewing the applicability of the exemptions for DAS facilities-based projects is adequate for the Commission's purposes as CEQA Lead Agency and in the public interest.

Conclusions of Law

1. Applicant has the financial ability to provide the proposed service.
2. Applicant has sufficient technical expertise to operate as a telecommunications carrier.

3. Public convenience and necessity require the competitive local exchange services to be offered by Applicant, subject to the terms and conditions set forth herein.

4. It can be seen with certainty that Applicant's construction projects and mitigation measures detailed in its PEAs attached to its application will not have a significant effect on the environment.

5. Applicant should use its modified CEQA review process for its future construction projects.

6. The application should be granted to the extent set forth below.

7. Applicant, once granted a CPCN, should be subject to the applicable Commission rules, decisions, General Orders, and statutes that pertain to California public utilities.

8. Applicant's initial tariff filing should correct the deficiencies noted in its draft tariffs as indicated in Attachment A to this decision.

9. Applicant has shown good cause for granting its motion for a limited protective order and to file certain information under seal.

10. Because of the public interest in CLECs, the following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. NewPath Networks, LLC's (Applicant) Certificate of Public Convenience and Necessity is expanded to include full facilities-based competitive local exchange and access services in the service territories of Pacific Bell Telephone Company, Verizon California Inc., SureWest Telephone Company, Citizens

Telecommunications Company of California and NDIEC service for the entire state of California.

2. Applicant is authorized to file tariff schedules for the provision of competitive local exchange services (CLECs). Applicant may not offer such service until tariffs are on file. Applicant's initial filing shall be made in accordance with General Order (GO) 96-A, excluding Sections IV, V, and VI, and shall correct the deficiencies noted in Attachment A. The tariff shall be effective not less than one day after approval by the Commission's Telecommunications Division. Applicant shall comply with its tariffs.

3. The certificate granted and the authority to render service under the rates, charges, and rules authorized herein will expire if not exercised within 12 months after the effective date of this order.

4. The corporate identification number assigned to Applicant, U-6928-C, shall be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

5. Applicant shall comply with all applicable rules adopted in the Local Exchange Competition proceeding (Rulemaking (R.) 95-04-043/ Investigation 95-04-044), as well as all other applicable Commission rules, decisions, GOs, and statutes that pertain to California public utilities, subject to the exemptions granted in this decision.

6. Applicant shall comply with the requirements applicable to CLECs included in Attachment B to this decision.

7. Applicant is authorized to construct equipment to be installed in existing buildings or structures. For all other future construction projects Applicant shall use the modified California Environmental Quality Act (CEQA) review process set forth in Attachment E to this decision, pending any decision in R.00-02-003 that modifies this authority.

8. The staff of the Energy Division is authorized to review, process, and respond to Applicant's requests for exemptions from CEQA.

9. Applicant shall not engage in any construction activity related to a pending exemption request prior to receiving a Notice-to-Proceed (NTP) from the Energy Division staff.

10. Should the Energy Division staff be unable to issue an NTP confirming the applicability of a CEQA exemption to a specific Applicant activity, Applicant shall file a formal application with the Commission seeking a discretionary grant of construction authority for that specific activity.

11. All information placed under seal shall remain sealed for two years from the effective date of this decision. During that period information shall not be made accessible or disclosed to anyone other than the Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as the Law and Motion Judge. If Applicant believes that it is necessary to keep this information under seal for a period longer than two years, Applicant shall file a new motion at least 30 days before the expiration date of this limited protective order.

12. Application 05-05-021 is closed.

This order is effective today.

Dated April 13, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners

A.05-05-021 ALJ/MFG/hl2

ATTACHMENT A

List of deficiencies in tariffs filed by NewPath Networks, LLC in A.05-05-021 to be corrected in its Tariff Compliance Filing.

1. Sheet 6: include the actual service area map in the tariff.
2. Sheet 26: include the following in the CPC tariff: "Pursuant to Resolution T-16901, all telecommunications carriers are required to apply CPUC mandated Public Program surcharge rates (including (a) Universal Lifeline Telephone Service (ULTS) billings; (b) charges to other certificated carriers for services that are to be resold; (c) coin sent paid telephone calls (coin in box) and debit card calls; (d) customer-specific contracts effective before 9/15/94; (e) usage charges for coin-operated pay telephones; (f) directory advertising; and (g) one way radio paging) and the CPUC Reimbursement Fee rate (excluding (a) directory advertising and sales; (b) terminal equipment sales; (c) inter-utility sales) to intrastate services. For a list of the Public Program surcharges and Reimbursement Fee, and the amounts, please refer to the Pacific Bell (d.b.a. SBC California) tariffs.
3. Include sample forms in the CLC tariff.

(END OF ATTACHMENT A)

ATTACHMENT B

**REQUIREMENTS APPLICABLE TO
COMPETITIVE LOCAL EXCHANGE CARRIERS**

Applicant shall file, in this docket, a written acceptance of the certificate granted in this proceeding within 30 days of the effective date of this order.

Applicant is subject to the following fee and surcharges that must be regularly remitted per the instructions in Appendix E to Decision (D.) 00-10-028. The Combined California PUC Telephone Surcharge Transmittal Form must be submitted even if the amount due is zero.

- a. The current 1.29% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the Universal Lifeline Telephone Service Trust Administrative Committee Fund (Pub. Util. Code § 879; Resolution T-16966, dated December 1, 2005, effective January 1, 2006);
- b. The current 0.27% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Relay Service and Communications Devices Fund (Pub. Util. Code § 2881; D.98-12-073 and Resolution T-16965, dated December 1, 2005, effective January 1, 2006);
- c. The user fee provided in Pub. Util. Code §§ 431-435, which is 0.11% of gross intrastate revenue (Resolution M-4816, dated March 15, 2006, effective April 1, 2006);
- d. The current 0.21% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-A (Pub. Util. Code § 739.3; D.96-10-066, pp. 3-4, App. B, Rule 1.C; Resolution T-16963, dated December 1, 2005, effective January 1, 2006);

e. The current 2.00% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-B (D.96-10-066, p. 191, App. B, Rule 6.F., Resolution T-16964, dated December 1, 2005, effective January 1, 2006); and

f. The current 0.13% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Teleconnect Fund (D.96-10-066, p. 88, App. B, Rule 8.G, Resolution T-16888, dated December 1, 2005, effective January 1, 2006).

3. Applicant is a competitive local exchange carrier (CLC). The effectiveness of its future tariffs is subject to the schedules set forth in Appendix C, Section 4.E of D.95-12-056:

"E. CLCs shall be subject to the following tariff and contract filing, revision and service pricing standards:

- (1) Uniform rate reductions for existing tariff services shall become effective on five (5) working days' notice. Customer notification is not required for rate decreases.
- (2) Uniform major rate increases for existing tariff services shall become effective on thirty (30) days' notice to the Commission, and shall require bill inserts, or first class mail notice to customers at least 30 days in advance of the pending rate increase.
- (3) Uniform minor rate increases, as defined in D.90-11-029, shall become effective on not less than (5) working days' notice to the Commission. Customer notification is not required for such minor rate increases.
- (4) Advice letter filings for new services and for all other types of tariff revisions, except changes in text not

affecting rates or relocations of text in the tariff schedules, shall become effective on forty (40) days' notice.

- (5) Advice letter filings revising the text or location of text material which do not result in an increase in any rate or charge shall become effective on not less than five (5) days' notice to the Commission.
- (6) Contracts shall be subject to GO 96-A rules for NDIECS, except interconnection contracts.
- (7) CLCs shall file tariffs in accordance with PU Code § 876."

4. Applicant may deviate from the following provisions of GO 96-A:
(a) paragraph II.C.(1)(b), which requires consecutive sheet numbering and prohibits the reuse of sheet numbers; and (b) paragraph II.C.(4), which requires that "a separate sheet or series of sheets should be used for each rule." Tariff filings incorporating these deviations shall be subject to the approval of the Commission's Telecommunications Division. Tariff filings shall reflect all fees and surcharges to which Applicant is subject, as reflected in 2 above.

5. Applicant shall file a service area map as part of its initial tariff.

6. Prior to initiating service, Applicant shall provide the Commission's Consumer Affairs Branch with the name and address of its designated contact person(s) for purposes of resolving consumer complaints. This information shall be updated if the name or telephone number changes, or at least annually.

7. Applicant shall notify the Director of the Telecommunications Division in writing of the date that local exchange service is first rendered to the public, no later than five days after service first begins.

8. Applicant shall notify the Director of the Telecommunications Division in writing of the date interLATA) service is first rendered to the public within

five days after service begins, and again within five days after intraLATA service begins¹

9. Applicant shall keep its books and records in accordance with the Generally Accepted Accounting Principles.

10. In the event Applicant's books and records are required for inspection by the Commission or its staff, it shall either produce such records at the Commission's offices or reimburse the Commission for the reasonable costs incurred in having Commission staff travel to its office.

11. Applicant shall file an annual report with the Director of the Telecommunications Division, in compliance with GO 104-A, on a calendar-year basis with the information contained in Attachment C to this decision.

12. Applicant shall file an affiliate transaction report with the Director of the Telecommunications Division, in compliance with D.93-02-019, on a calendar year basis using the form contained in Attachment D.

13. Applicant shall ensure that its employees comply with the provisions of Public Utilities (Pub. Util.) Code § 2889.5 regarding solicitation of customers.

14. Within 60 days of the effective date of this order, Applicant shall comply with Pub. Util. Code § 708, Employee Identification Cards, and notify the Director of the Telecommunications Division in writing of its compliance.

15. If Applicant is 90 days or more late in filing an annual report, or in remitting the surcharges and fee listed in 2 above, the Telecommunications

¹ California is divided into ten LATAs), each containing numerous local telephone exchanges. InterLATA describes services, revenues and functions relating to telecommunications originating within one LATA and terminating in another LATA. IntraLATA describes services, revenues and functions relating to telecommunications originating within a single LATA.

Division shall prepare for Commission consideration a resolution that revokes Applicant's CPCN unless it has received written permission from the Telecommunications Division to file or remit late.

16. Applicant is exempt from General Order 96-A, subsections III.G(1) and (2), and Commission Rule of Practice and Procedure 18(b).

17. Applicant is exempt from Pub. Util. Code §§ 816-830.

18. Applicant is exempt from the requirements of Pub. Util. Code § 851 for the transfer or encumbrance of property whenever such transfer or encumbrance serves to secure debt.

19. If Applicant decides to discontinue service or file for bankruptcy, it shall immediately notify the Telecommunications Division's Bankruptcy Coordinator.

20. Applicant shall send a copy of this decision to concerned local permitting agencies not later than 30 days from the date of this order.

(END OF ATTACHMENT B)

ATTACHMENT C

ANNUAL REPORT

An original and two copies shall be filed with the California Public Utilities Commission, 505 Van Ness Avenue, Room 3107, San Francisco, CA 94102-3298, no later than March 31st of the year following the calendar year for which the annual report is submitted.

Failure to file this information on time may result in a penalty as provided for in §§ 2107 and 2108 of the Public Utilities Code.

Required information:

1. Exact legal name and U # of the reporting utility.
2. Address.
3. Name, title, address, and telephone number of the person to be contacted concerning the reported information.
4. Name and title of the officer having custody of the general books of account and the address of the office where such books are kept.
5. Type of organization (e.g., corporation, partnership, sole proprietorship, etc.).
If incorporated, specify:
 - a. Date of filing articles of incorporation with the Secretary of State.
 - b. State in which incorporated.
6. Number and date of the Commission decision granting the CPCN.
7. Date operations were begun.
8. Description of other business activities in which the utility is engaged.
9. List of all affiliated companies and their relationship to the utility. State if affiliate is a:
 - a. Regulated public utility.
 - b. Publicly held corporation.
10. Balance sheet as of December 31st of the year for which information is submitted.
11. Income statement for California operations for the calendar year for which information is submitted.

For answers to any questions concerning this report, call (415) 703-2883.

(END OF ATTACHMENT C)

ATTACHMENT D
CALENDAR YEAR AFFILIATE TRANSACTION REPORT

1. Each utility shall list and provide the following information for each affiliated entity and regulated subsidiary that the utility had during the period covered by the annual Affiliate Transaction report.

- Form of organization (e.g., corporation, partnership, joint venture, strategic alliance, etc.);
- Brief description of business activities engaged in;
- Relationship to the utility (e.g., controlling corporation, subsidiary, regulated subsidiary, affiliate);
- Ownership of the utility (including type and percent ownership)'
- Voting rights held by the utility and percent;
- Corporate officers.

2. The utility shall prepare and submit a corporate organization chart showing any and all corporate relationships between the utility and its affiliated entities and regulated subsidiaries in #1 above. The chart should have the controlling corporation (if any) at the top of the chart; the utility and any subsidiaries and/or affiliates of the controlling corporation in the middle levels of the chart and all secondary subsidiaries and affiliates (e.g., a subsidiary that in turn is owned by another subsidiary and/or affiliate) in the lower levels. Any regulated subsidiary should be clearly noted.

3. For a utility that has individuals who are classified as "controlling corporations" of the competitive utility, the utility must only report under the requirements of #1 and #2 above any affiliated entity that either (a) is a public utility or (b) transacts any business with the utility filing the annual report excluding the provision of tariffed services.

4. Each annual report must be signed by a corporate officer of the utility stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

5. Any required material that a utility is unable to provide must be reasonably described and the reasons the data cannot be obtained, as well as the efforts expended to obtain the information, must be set forth in the utility's annual Affiliate Transaction Report and verified in accordance with Section I-F of Decision 93-02-019.

6. Utilities that do not have affiliated entities must file, in lieu of the annual transaction report, an annual statement to the commission stating that the utility had no affiliated entities during the report period. This statement must be signed by a corporate officer of the utility, stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

(END OF ATTACHMENT D)